THANGAVELU ARUMUGAM & ORS.

v.

LEMBAGA PELABUHAN KELANG

FEDERAL COURT, KUALA LUMPUR
RAJA AZLAN SHAH LP
SALLEH ABAS FJ
EUSOFFE ABDOOLCADER J
[CIVIL APPEAL NO. 239 OF 1982]
8 JANUARY 1983

LABOUR LAW: *Employment - Civil servants working on secondment basis with statutory body - Section 52, Port Authorities Act 1963 - Accepting contract commencing at end of term - Whether Suffian Salary Scheme applicable - Whether s. 52 still applicable.*

The respondent was a statutory body established by the Port Authorities Act 1963 ("the Act"). It took over from the Malayan Railway Administration ("the Administration") the management of running Port Kelang. Staffing arrangements were governed by s. 52 of the Act. The appellants were transferred to serve the respondent but later exercised their option to revert to the services of the Administration, continuing to work for the respondent on secondment basis. The appellants were eligible to do work on secondment for five years only. Before the end of the period, they were offered permanent employment with the respondent. They accepted the offers. The salaries were based on Benham Salary Schemes. Benham was replaced by Suffian Salary Scheme, which was not applicable to statutory bodies.

The statutory bodies, however, received their revision of salaries with the implementation of the Harun Salary Scheme. The appellants' salaries were converted direct from Benham to Harun. The appellants objected to this, claiming that as civil servants they ought to have been given Suffian when they entered the services of the respondent. They submitted that their contracts with the respondent were null and void, that the respondent was bound by the guarantee of no less favourable treatment provided by s. 52 and that the principle of comparative treatment ought to have applied.

Held:

[1] At the end of the secondment period, the respondent ceased to be bound by s. 52 any more. The question of continued employment of the appellants became a matter of discretion for the respondent.

[2] Section 52 had no application to the contracts of service of the appellants.The fact that the offers by the respondent were made during the period of secondment was irrelevant, as the offers related to future employment on the expiration of the period on secondment basis.

[3] The contracts of service were valid. They were not affected by the principle of comparative treatment contained in s. 52 as this section did not apply to the contracts, as already held above.

[4] The respondent was under no duty to apply Suffian conversion to the appellants' salaries before conversion to Harun.

[5] There was no question of the appellants having the status of employees of the Administration whilst permanently employed by the respondent at the same time. The contract of service with the respondent was valid, and effectively governed the relationship between the parties.

[6] As the appellants ceased to be the Administration's employees on their permanent employment with the respondent, no comparison could be made between their salaries and those of their former colleagues still with the Administration.

[Appeal dismissed.]

Legislation referred to:
Port Authorities Act 1963, ss. 13, 52, (1), (2), (3)

For the appellants - G. T. Rajan; M/s. G. T. Rajan & Co.
For the respondent - S. Selvanathan; M/s. Tunku Zuhri, Manan & Abdullah

JUDGMENT

Salleh Abas FJ:

The respondent is a statutory body established on 1 July 1963 by the Port Authorities Act 1963 for the purpose of taking over the management and responsibilities of running Port Kelang which prior to that date was run and managed by the Malayan Railway Administration (referred to in this judgment as "the Administration"). Staffing arrangements between the Administration and the respondent were governed by s. 52 of which the first three subsections being relevant for the purpose of determining this appeal and for ease of reference are reproduced below as follows:

> 52. (1) Subject to the provisions of this Act, any person who immediately before the date of establishment of the Authority was an officer or servant of the Administration and who in the opinion of the Minister is necessary to the proper operation of the port shall as from the said date become an officer or servant of the Authority, on terms and conditions of service not less favourable than those which were attached to his service immediately before that date.
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> (2) Any officer or servant of the Administration who has by virtue of sub-section (1) become an officer or servant of the Authority may, not later than twelve months from the making of any rules under s. 15 (relating to salaries, allowances and conditions of service of officers and servants) by the Authority, elect in writing whether to continue in the service of the Administration; and if he elects to revert to the service of the Administration, shall thereupon revert to the service of the Administration on terms and conditions not less favourable than those which would have attached to his service had he not become an officer or servant of the Authority by virtue of sub-section (1); and his service with the Authority shall be deemed to be service with the Administration.
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> (3) Any officer or servant who reverts to the service of the Administration under sub-section (2) may, by reason that no vacancy is immediately available for him in the service of the Administration, be required by the Administration, and the Authority shall permit him, to continue to serve with the Authority for a period not exceeding five years.

These twenty appellants were former employees of the Administration engaged at the port when it was under the responsibilities of the Administration. It was accepted by both parties that whilst under the employment of the Administration the appellants were members of the public service of the Federation within the meaning of Part X of the Federal Constitution (referred to in this judgment as "civil servants")

On the establishment of the respondent, the appellants were accordingly transferred by the Minister of Transport to serve the respondent in accordance with sub-section (1) of s. 52 of the Act. On 31 March 1966 the appellants exercised their option under sub-section (2) to revert to the services of the Administration. Because there were no vacancies for them in

the services of the Administration, the appellants continued to work for the respondent, but only on secondment basis. Under sub-section (3) the appellant's eligibility to serve the respondent on secondment basis was only to last for five years. The sub-section makes no provision as to what would happen when the secondment period ended. However, it is fair to conclude that at the end of the period the respondent was no longer bound to accept employment the appellants on secondment basis or even to employ them altogether. Thus in order to ensure that the appellants would not become unemployed at the end of their secondment period, on 25 December 1971 the respondent offered them permanent employments as clerks in its services. The appellants accepted the offers on 31 December 1971 and thus became its permanent employees ever since.

The salaries offered and accepted were those based on Benham Salary Schemes (referred to in this judgment as "Benham") which were currently applicable to all statutory bodies including the respondent. Benham was replaced as regards civil servants by Suffian Salary Scheme (referred to in this judgment as "Suffian") on 1 October 1970, with retrospective effect to 1 January 1970. Suffian was never made applicable to employees of statutory bodies and it was not until the implementation of Harun Salary Scheme (in this judgment referred to as "Harun") on 15 January 1975 that employees of statutory bodies received their revision of salaries. Like Suffian, Harun was also given retrospective effect to 1 January 1970.

As a result of implementation of Harun to its employees, the respondent converted the appellants' salaries direct from Benham to Harun in accordance with conversion tables laid down in Public Service Department's Service Circular No. 1 of 1975. The appellants objected to this direct method of conversion because they stood to lose RM240 a month in comparison to their former colleagues who remained in the service of the Administration. They contended that their salaries ought to be converted first to Suffian before final conversion to Harun. They claimed that they were entitled to Suffian as of right because they were still in the services of the Administration and therefore civil servants when Suffian was implemented and that when they entered the services of the respondent they ought to be given Suffian and not Benham.

That objection was accepted by their former employer, the Administration, which eventually took action to apply Suffian to the appellants in respect of that part of their service with the Administration from 1 January 1970 to 30 March 1971. Arrears of salaries were subsequently paid to them on 15 October 1971.

The respondent, however, refused to follow suit in respect of their service with the respondent commencing from the date of their acceptance of the offer on 31 March 1971 up to the present date. It refused to do so on the ground that Suffian was never applicable to statutory bodies and that appellants' services with the respondent were on the basis of fresh contracts which were concluded on 31 March 1971 when they accepted the respondent's offers.

As a result of the refusal the appellants appealed to the Public Service Department on 21 October 1977 but the reply from that Department dated 8 December 1977 was in the negative.

The appellants therefore took out a writ on 11 October 1978 against the respondent claiming arrears of salaries and other ancillary remedies on the ground that the failure of the respondent to convert their salaries to Suffian before applying Harun to their salaries constituted, according to paras. 9 and 12 of their statement of claim, "a breach of contract of employment". Vohrah J dismissed the suit and hence this appeal.

Prior to the acceptance of the offers of appointment on 31 March 1971 the basis of the appellants' services at Port Kelang was statutory, i.e. being governed by sub-sections (1), (2) and (3) of s. 52 of the Act and thereafter their services were based on contracts of employment of which offers were on 25 March 1971 made and accepted on 31 March 1971. Thus the appellants' services at the port fell into three categories:

(a) as transferred officers under sub-section (1), because of transfers made by the Minister of Transport from the services of the Administration to those of the respondent from 1 July 1963 to 31 March 1966;

(b) as seconded officers under sub-section (3) for a period of five years commencing from 31 March 1966 to 30 March 1971, because of the option they exercised under sub-section (2) to revert to the Administration;

(c) as permanent officers of the respondent from 31 March 1971 up to the present date because they were taken into the services of the respondent by virtue of the appellant's acceptance of the offers of employment.

The suit, according to paras. 9 and 12 of the statement of claim, is based on a breach of contract of appointment and Service Circular No. 1/1975. In order to show that the appellants are entitled as of right to Suffian, Mr. Rajan, their Counsel, submitted that as the offers of employments were made during the five year secondment period, the guarantee of no less favourable treatment under sub-section (2) applies. There were some arguments presented by both sides as to the expiry date of the five years period of secondment. Mr. Rajan said that the period ended on 31 March 1971 whilst Mr. Selvanathan, Counsel for the respondent, contended that it ended on 30 March 1971. In our judgment the expiry date depends upon the date of its commencement. It is clear that under sub-section (2), it commenced on the date when options to revert to the Administration were exercised by the appellants. These having been exercised on 31 March 1966, this date should therefore be the commencement date of the said five year period. That being the case, the expiry date must be 30 March 1971. In any case, whatever may be the dispute as regards the expiry date of the secondment period, it is clear that the offers of employments, having been dated 25 March 1971, were made well within the period and the question to be considered is whether s. 52 applies to these offers.

According to sub-sections (1), (2) and (3) of this section, the guarantee of no less favourable treatment than those applicable to their colleagues in the service of the Administration would continue only so long as the appellants remained in the service of the Administration but once they ceased to be the Administration's employees, the guarantee would also cease because the principle of comparative treatment embodied in the subsections only operates when the subjects of comparison, i.e. the appellants and their colleagues are under one and the same employer. Thus the principle applies to all transferred officers under sub-section (1) and to all reverting officers and those on secondment under sub-sections (2) and (3). Although under sub-section (1) transferred officers were assimilated to become officers of the respondent, in reality they were still officers of the Administration and the transfers were made as a result of their consent. (See p. 78 of the Appeal Record). Further, whilst the section guarantees the comparative treatment, it does not, however, guarantee the continued employment of these officers in the services of the Administration. There is nothing in subsection (3), or in any other subsection, which provides for such guarantee of employment, so that the principle of comparative treatment could apply. All that sub-section (3) says is that all reverting employees of the Administration would be sure of employment but only on

secondment basis for a period of five years if the Administration made a request to the respondent because of non-availability of vacancies and in such event the respondent had no choice but to comply with the request. The subsection is completely silent and makes no provision at all as to employment prospect of these employees when the secondment period would end.

In our view at the end of that period the respondent ceased to be bound by the section any more. It was no longer under any obligation to employ the appellants, either on secondment basis or on any other arrangement, neither could the Administration make any binding request to the respondent to employ the appellants. The question of continued employment of the appellants after this period of secondment therefore became a matter of discretion of the respondent under its general power of employing officers and servants under s. 13 and was no longer governed by s. 52. And it was in pursuance of this power and with a view of assisting the appellants to continue to be employed that the offers dated 25 March 1971 were made. The fact that these offers were made during the period of secondment is irrelevant and it does not mean that s. 52 applies to them, because these offers did not deal with employments during the secondment period but related to future employments which would take place upon the expiration of the employments on secondment basis. In our view this section has no application to the contracts of service of the appellants.

Mr. Rajan also submitted that the contracts of service entered into by the appellants on 31 March 1971 were null and void because they were contrary to the principle of comparative treatment contained in s. 52 of the Act. With respect we disagree with the submission. We have already concluded that the section has no application to these contracts because they were not intended to be acted upon during the currency of the secondment period, but on its termination. It therefore follows that the contracts were not caught by the section and we therefore hold that they were perfectly valid contracts.

The next question is to see whether there is anything in the offers capable of showing that the respondent must apply Suffian conversion to the appellants. Under sub-paragraph (a) of para. 2 of the offer, the appellants became the employees of the respondent on the date they accepted the offers, i.e. 31 March 1971 and under sub-paragraph (e) they ceased to enjoy any privileges which they used to enjoy whilst in the services of the Administration except what is stated in sub-paragraph (k). This sub-paragraph deals with retirement benefits in respect of the appellants' services under the Administration to the effect that any accrued benefits under the Pensions Ordinance would be frozen and be paid only when they reached the retiring age or be in retiring circumstances. Sub-paragraph (g) states that the appellants were subject to rules with regard to employment, discipline and conditions of service of the respondent's employees from time to time under Port Authorities Act 1963.

It is undeniable that Suffian was never made applicable to the respondent except as a matter of grace when it applied the same to its IMG and Division IV employees. As Harun applied to the respondent, the Public Services Department Service Circular No. 1/1975 giving conversion tables as to how Harun was to be applied would automatically apply under this subparagraph to the appellants. But there is nothing in this circular which shows that Suffian conversion must be made to the appellant's salaries before conversion to Harun. All that the appellant's Counsel showed us was that Suffian was applied by the respondent to its IMG and Division IV employees and that Bank Negara, another statutory body, applied it to its officers of the same category as the appellants. The answer to this submission is that the application by the respondent and Bank Negara was not pursuant to any legal obligation, but related purely on optional and discretionary basis. Such optional application cannot be

the foundation upon which the appellants could base their claim of rights to Suffian conversion. If the respondent is not under a duty to apply Suffian, the appellants would clearly have no right to insist upon its application; right and duty being corollary to each other. Even the respondent's IMG and Division IV employees whose salaries were converted to Suffian by the respondent's grace could not claim the conversion as of right, but only as a bounty or gift.

The only possible ground upon which the appellants could succeed in this appeal is whether they were still employees of the Administration, despite the acceptance of the offers of employment so that they could continue to enjoy the comparative treatment and therefore be entitled to Suffian conversion. In our view this point is a non-starter because paras. 9 and 12 of their statement of claim clearly premise their suit on the basis of breach of contract of employment. This means that the contract was a valid and effective contract and it is this contract which governs the appellants' relationship with their new employer and according to sub-paragraph(a) of para. 2 of the offers they ceased to be employees of the Administration. There is therefore no question of the appellants having the status of the Administration's employees whilst permanently employed by the respondent at the same time. Mr. Rajan would have us accept this absurd conclusion, because he said there was no break in the services of the appellants before entering into the respondent's services. In our view the fact that there was no break in their services is immaterial because the arrangements to make the appellants' entering the services of the respondent were of a special nature and timed in such a way as to take effect immediately upon the cessation of the secondment period so that the appellants would not be out of employments. There is nothing in law which requires a break in the service before a person can change his employer. This is purely a matter of consent by both parties to the contract. In this case it is clear that the appellants' services under the respondent began when their employment under the Administration ceased. It ceased on 30 March 1971 and began the next day, i.e. 31 March 1971.

Of course, if the appellants carried the status of employees of the Administration into their services under the respondent, they should be entitled to Suffian conversion, because as we have said earlier the principle of comparative treatment applies as long as the appellants were employees of the Administration. The question is, did they carry that status along? Our answer is in the negative. Employees of the Administration are deemed to be civil servants and under the present practice a person ceases to be a civil servant upon the happening of any of the following events, namely-

(1) death;

(2) resignation;

(3) termination of service;

(4) dismissal; and

(5) retirement in accordance with the Pensions Ordinance.

There was of course no death, nor termination of service, nor dismissal, nor retirement except that the appellants' accrued pension was preserved. Could the acceptance of the offers therefore amount to resignation by the appellants agreed to by all the parties concerned, namely the Administration, the respondent and the appellants?

It is to be observed that on 30 March 1971, i.e. one day before the expiry of the offers, the appellants were reminded by the Administration of the non-availability of vacancies in its services and the possibility of the appellants being prematurely retired unless the offers were

accepted. As far as the respondent was concerned, its attitude was that it offered them jobs because it was moved by a moral consideration to assist the Administration solving its staff redundancy problems and to prevent the appellants from being unemployed. It was on the basis of this understanding and appreciation that the offers were made and accepted. The situation reveals a complete abandonment by the parties concerned of the appellant's position in the establishment of the Administration and a clear intention and understanding that the appellants were to be the employees of the respondent. In our view acceptance of these offers under these circumstances clearly amount to resignation taking immediate effect from the Administration's services.

During the course of his submission Mr. Rajan dealt with two other matters. The first is the comparison between the appellants' salaries and those of their former colleagues who remained in the services of the Administration. With respect, we are of the view that this submission is without any merit because the appellants ceased to be the Administration employees and became no longer comparable to their former colleagues as a result of the acceptance of the offers. The second is the submission on the firmness of the respondent in refusing to apply Suffian to the appellants. As the absorption of the appellants into the employment of the respondent was a matter of discretion and policy decision of the respondent and the absorption governed by the contract of employment, the respondent's reason for refusing to apply Suffian is completely irrelevant. Moreover, there is nothing unreasonable or arbitrary on the part of the respondent in refusing to apply Suffian when such application would create discrimination against its other employees who had never been seconded from the Administration. The possibility of discrimination is implicit in the evidence of DWI, the respondent's Director of Staff, who said that "Some of the railway staff earned more than our regular Authority staff". The appellants well appreciated this problem as they made no comparison at all between themselves and those of their colleagues in the services of the respondent. We therefore hold that the refusal by the respondent to apply Suffian to the appellants *per se*, without any breach of contract, nor statute, cannot be the basis of their claim of right to Suffian conversion.

Finally, as the appellants' entry into the permanent establishment of the respondent was based on contracts of employment, and as there was nothing in the contract to show that the respondent must apply Suffian conversion before converting their salaries to Harun, it is too late for them to do anything, and we certainly have no power to re-write their contracts to include this provision. The appellants should have made counter offers before accepting the respondent's offers on 31 March 1971. Probably they saw no advantage to be gained by insisting upon that condition as they well knew that the respondent was under no obligation to absorb them into its establishment, still less to agree to include Suffian in their offers which would only result in the respondent having difficulties as regards its other employees.

Thus for the reasons given above, the appeal is dismissed with costs and the deposit should be paid to the respondent on account of taxed costs.

Also found at [1983] 1 CLJ 187